Supreme Court, U.S.
FILED
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No. 99-367

In The

Supreme Court of the United States

MARY SMYLY,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

On Petition For A Writ Of *Certiorari* From The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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26pp

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals denied petitioner equal protection of the laws under the United States Constitution by affirming the district court's dismissal of petitioner's civil action against IBM based on the parties' briefs and the record and without holding oral argument.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

The following companies are subsidiaries of respondent International Business Machines Corporation ("IBM"):

Ancor Communications, Inc.
Dassault Systemes S.A.
Image Business Systems Corp.
I/Net, Inc.
Object Design, Inc.
Seer Technologies, Inc.
Silicon Valley Group, Inc.
Uniquest, Inc.

IBM does not have any parent corporations.

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

Respondent International Business Machines Corporation ("IBM") respectfully requests that this Court deny petitioner Mary Smyly's petition for a writ of *certiorari*, which seeks review of the Ninth Circuit's decision affirming the district court's dismissal of petitioner's civil action against IBM.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, App. 1-App. 5), which affirmed the district court's order of dismissal, was ordered not published. The order of the district court dismissing petitioner's case (App., *infra*, App. 6-App. 8) is also unpublished.

JURISDICTION

The court of appeals affirmed the district court's dismissal on April 27, 1999. Petitioner's request for rehearing was denied on May 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner in her petition invokes section 1 of the Fourteenth Amendment to the United States Constitution, which provides that "no State shall . . . deny to any

person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's employment discrimination case was dismissed by the district court (Honorable Ronald M. Whyte) on December 12, 1997, after that court found that petitioner had entered into an enforceable settlement agreement with IBM on January 24, 1995, but which petitioner refused for nearly three years to consummate in disregard of two court orders.

Erroneous in numerous non-material respects, petitioner's factual recitation in her petition contains at least one material misrepresentation that necessitates correction here. Petitioner asserts that although she was present at the inception of the settlement conference on January 24, 1995, U.S. Magistrate Judge Edward E. Infante (who facilitated the negotiations) "ordered that the conference continue and conclude by telephone [the next day] and excluded [petitioner's] participation. . . . " Petition for Writ of *Certiorari* ("Petition"), at 5. This statement is contradicted by the record. When the settlement conference ended at 9:30 p.m. on January 24, negotiations as to the terms of the settlement had concluded – all that was left to do was confirm the settlement on the record. (ER 00554.) Due to the late hour and the unavailability of a court reporter, the parties agreed to place the settlement on the record the next day. At no time did Magistrate Judge Infante exclude petitioner from participating in that proceeding.

Magistrate Judge Infante evidenced these facts at the telephone conference on January 25, 1995. In that call, Magistrate Judge Infante noted for the record "as the settlement judge, that the plaintiff expressly agreed to the settlement at the settlement conference yesterday." (ER 00558.) Petitioner's contention that she was not present for the entire settlement conference, and that it continued in her absence on January 25, is belied by Magistrate Judge Infante's statement for the record on January 25 that petitioner had agreed to the settlement the night before. (*Id.*)

Furthermore, during the evidentiary hearing on IBM's motion to enforce the settlement agreement, petitioner herself acknowledged on the record that she had agreed to the settlement:

> MS. BURDICK: Mary, the last question I have for you, are there any circumstances under which you would accept the terms of the settlement that were arrived at on January 24, 1995?
>
> MS. SMYLY: The night of the hearing?
>
> MS. BURDICK: The night of the settlement conference.
>
> MS. SMYLY: I have always maintained that I felt manipulated into it, pressured into it. But if the court decided that I had to adhere to *what I agreed to, because I did agree to it*, and if the court said I had to do that knowing the circumstances, then, yes, I have to agree to it. I mean there is nothing else for me to do.

(ER 00729-00730) (emphasis supplied).

REASONS PETITION SHOULD BE DENIED

I. Petitioner's Challenge To A Routine And Universal Appellate Procedure Does Not Constitute Sufficient Grounds For Granting A Writ Of *Certiorari*; Indeed, This Court Has Already Held That The U.S. Constitution Does Not Require Oral Argument In All Cases.

This Court's Rule 10 sets forth the grounds for granting *certiorari*: (1) a conflict exists amongst certain courts on an important legal issue; (2) a decision by a court of appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; or (3) a decision by a state court or federal court of appeals on an important question of federal law has not been, but should be, settled by this Court.

The petition here fails to raise any of these grounds. Indeed, the petition consists of nothing more than an attack on the routine procedures of the federal appellate court system – procedures that have been authorized by this Court and universally followed by the federal courts of appeals.

Petitioner asks the Court to grant her petition based primarily on the fact that the Ninth Circuit denied her request for oral argument and instead decided her appeal on the basis of the parties' briefs and the record.[1] Specifically, petitioner asserts that the Ninth Circuit's refusal

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[1] The Ninth Circuit first notified the parties that the court was considering deciding the case without oral argument, but gave them the opportunity to submit a statement setting forth the reasons why oral argument should be granted. *See* App.,

to hear oral argument violates the Equal Protection Clause of the United States Constitution as well as her "statutory right of appeal." *See* Petition, at *i*.[2]

The Ninth Circuit's refusal to hear oral argument, however, is specifically sanctioned by Federal Rule of Appellate Procedure ("FRAP") 34. FRAP 34(a)(2) states:

> (2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and

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infra, App. 8. Petitioner did so (*see id.*, App. 9), and the case was thereafter set for oral argument with the proviso that the three-judge panel assigned to hear the argument would retain discretion to submit the case on the briefs without oral argument. *See id.*, App. 10. On March 31, 1999 – two full weeks before oral argument was to be heard – the court informed the parties that the panel had decided that oral argument was not necessary. *See id.*, App. 11.

[2] Petitioner also challenges the court of appeals' decision not to publish its opinion affirming the ruling of the district court in the court's official reports. In particular, petitioner contends that the opinion was not "published" to the parties. *See* Petition, at 13. Petitioner is, of course, mistaken. Petitioner, like IBM, received a full copy of the court of appeals' opinion, which clearly set forth the reasons for its decision. *See* App., *infra*, App. 1 to App. 5. The fact that the opinion was unpublished does not mean that petitioner was left unaware of the reasons behind the court's decision; nor does it mean that the court was practicing "secret law." *See* Petition, at 13.

> record, and the decisional process would not be significantly aided by oral argument.

Here, the panel expressly found that oral argument was unnecessary under FRAP 34(a)(2). *See* Petition, App. at 2a n.** Further, petitioner acknowledges that this was the basis for the Ninth Circuit's decision not to hold oral argument. *See* Petition, at 11.

This Court has long ago held that the Constitution does not require oral argument in all cases. *See Federal Communications Comm'n* v. *WJR*, 337 U.S. 265, 276 (1949); *Price* v. *Johnston*, 334 U.S. 266, 286 (1948). In approving FRAP 34, this Court acknowledged the self-evident fact that, practically speaking, the courts of appeals cannot hear oral argument in every case placed on their dockets.

Every circuit in the United States adheres to FRAP 34(a)(2) and routinely denies oral argument when one of the factors delineated in the rule is satisfied.[3] Thus, petitioner's assertion (at page *i* of her petition) that the Ninth Circuit's practices are "not uniform" and "experimental" is woefully uninformed. Indeed, the Ninth Circuit's decision to rule on petitioner's appeal without oral argument is so commonplace that an electronic search of court of appeals decisions turned up no fewer than 505 cases – *in 1999 alone* – in which a circuit court panel decided an

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[3] *See* 1st Cir. L.R. 34.1(a), 1st Cir. I.O.P. VII; 2d Cir. L.R. 34(d); 3d Cir. L.R. 34.1(a), 3d Cir. I.O.P. 2.4; 4th Cir. L.R. 34(a), 4th Cir. I.O.P. 34.2; 5th Cir. L.R. 34.1, 34.2, 5th Cir. I.O.P. (screening); 6th Cir. L.R. 34(j), 6th Cir. I.O.P. 34(e); 7th Cir. L.R. 34; 8th Cir. L.R. 34A; 9th Cir. L.R. 34; 10th Cir. L.R. 34.1; 11th Cir. L.R. 34-3; D.C. Cir. L.R. 34(j); Fed. Cir. L.R. 34.

appeal without oral argument.[4] Clearly, 505 examples in one year does not reflect an "experimental" procedure meriting review by this Court.

The fact that petitioner appears before this Court *pro se* does not change the analysis.[5] There is no *pro se* exception to FRAP 34(a)(2).

Petitioner's argument that by deciding her appeal without oral argument, the Ninth Circuit denied her equal protection and/or her "statutory right of appeal" is nonsensical. The Ninth Circuit was merely following the rules adhered to by every federal appellate court in the nation. Because the court's decision to do so does not present a question appropriate for this Court to review, petitioner's petition should be denied.

II. Petitioner's Appeal Was Properly Decided Because The District Court Dismissed Her Case Only After Conducting A Full Evidentiary Hearing On The Circumstances Surrounding The Settlement And Twice Ordering Petitioner To Execute The Agreement, Which Orders Petitioner Blatantly Ignored.

On January 24, 1995, petitioner agreed – in front of a United States Magistrate Judge, her attorneys of record, and IBM's attorneys – to settle her lawsuit against IBM.

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[4] The search was conducted on September 17, 1999, using the Westlaw database.

[5] It bears noting that petitioner retained and then discharged no fewer than three sets of attorneys before deciding to proceed with the case *pro se*.

After petitioner refused to execute the settlement agreement, the district court held an evidentiary hearing regarding IBM's motion to enforce the agreement. During questioning by her attorney at the hearing, petitioner admitted that she had agreed to the settlement on January 24. *See* text at 3, *supra* ("I have always maintained that I felt manipulated into it, pressured into it. But if the court decided that I had to adhere to *what I agreed to, because I did agree to it*, and if the court said I had to do that knowing the circumstances, then, yes, I have to agree to it. I mean there is nothing else for me to do.") (ER 00729-00730, emphasis supplied.)

Although the district court and, subsequently, the Ninth Circuit fully considered all of the evidence introduced by the parties,[6] in reality petitioner's admission at the evidentiary hearing ends the analysis. In light of the fact that petitioner has never once introduced a shred of evidence explaining how – or by whom – she was "manipulated" or "coerced" into accepting the settlement, her admission that she did indeed agree to it is dispositive.

Moreover, and as set forth above, even the most cursory glance at the procedural history of this case shows the undeniably wide latitude afforded to petitioner by the district court over the six-and-a-half years since

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[6] While petitioner's "evidence" consisted of her recitation of "facts" that no one else could substantiate, IBM's showing included statements by a Magistrate Judge, petitioner's own attorneys – and even petitioner herself – that petitioner had, in fact, agreed to the settlement.

petitioner first filed her complaint before ultimately dismissing her action when she refused to consummate the settlement.[7] The Ninth Circuit properly found no error in this decision.

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[7] The record shows that Judge Whyte went to extraordinary lengths to ensure that petitioner was heard fully on every aspect of the settlement. For example, on one occasion, after a hearing regarding petitioner's refusal to comply with the court's order to execute the settlement agreement, Judge Whyte allowed petitioner to submit a letter detailing the comments that petitioner alleged she had not had time to assert at the hearing. Further, the district court did not dismiss petitioner's case until she had refused – on two occasions – to comply with the court's order to consummate the settlement or face dismissal of her action. Clearly, there was no denial by the district court of petitioner's right to be heard.

CONCLUSION

Petitioner presents no grounds for the Court to question a procedure that is uniformly followed by the courts of appeals and that is fully constitutional. Moreover, petitioner's appeal was fully considered by the Ninth Circuit before it affirmed the district court's dismissal of her case. Accordingly, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

JEFFREY D. WOHL
KIMBERLY A. PETERSON
ORRICK, HERRINGTON &
SUTCLIFFE LLP

Dated: September 28, 1999.

JEFFREY D. WOHL
Attorneys for Respondent
International Business Machines
Corporation

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY C. SMYLY, Plaintiff-Appellant, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant-Appellee.	No. 98-15075 D.C. No. CV-93-20149-RMW MEMORANDUM* (Filed Apr. 27, 1999)

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted April 13, 1999**
San Francisco, California

Before: GOODWIN, TROTT, and KING,*** District Judge.

Mary C. Smyly appeals pro se the district court's order dismissing her complaint for failure to comply with court orders and to diligently prosecute the consummation of the settlement. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

A district court may dismiss an action with prejudice "[f]or failure of the plaintiff to prosecute or to comply with any order of court." Fed.R.Civ.P. 41(b). We review a dismissal under Rule 41(b) for abuse of discretion. *See Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384 (9th Cir. 1996). A district court's decision regarding the enforceability of a settlement agreement is reviewed for abuse of discretion. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994). "Reversal is appropriate only if the court based its decision on an error of law or clearly erroneous findings of fact." *Id.* (quotation omitted).

A careful review of the record supports the District Court's dismissal. The parties, through counsel, negotiated a settlement on January 24, 1995 with a United States Magistrate Judge acting as settlement judge. The terms were placed on the record. The Magistrate Judge confirmed that Smyly participated at virtually every stage of the negotiations and, more importantly, had expressly agreed to the terms of the settlement at the settlement conference. After a lengthy evidentiary hearing, including testimony from counsel and Smyly, the District Judge found that a definitive settlement had been reached. On September 6, 1995, he ordered the settlement enforced. Substantial evidence in the record supports the District Judge's findings. The District Court did not abuse its discretion in enforcing the settlement agreement. *See Maynard*, 37 F.3d at 1401.

After Smyly refused to consummate the settlement by signing settlement documents, IBM sought to hold Smyly in contempt. Over a year later, on September 18, 1996, the Court refused to hold Smyly in contempt but

again confirmed that a binding settlement had been reached. The Court ordered the parties to prepare and execute a release and dismissal in accordance with the Court's instructions. In its September 18, 1996 Order, the Court twice specifically warned Smyly that failure to comply with its Order would result in dismissal of her case.

On January 8, 1997, the Court granted partial reconsideration and allowed worker's compensation claims to be excluded from the release. The Court again ordered compliance with the September 18, 1996 Order, and instructed Smyly to advise IBM regarding payment or, absent instructions, allowed IBM to satisfy its obligation by depositing funds with the Court.

Smyly again refused to consummate the settlement, conceivably because of a dispute about the release language. IBM filed a Motion to Dismiss. After extensive briefing, on August 22, 1997 the Court denied IBM's Motion, subject to the parties' compliance with its Order regarding the settlement. The Court prepared its own language for a release, which conformed to the settlement as the Court had enforced. The Court gave Smyly until September 12, 1997 to sign the release. The Court again notified Smyly that if she failed to comply with the Court's Order, IBM could renew its application for dismissal. Smyly failed to comply.

Accordingly, IBM filed another Motion to Dismiss. On December 12, 1997 – nearly three years after the settlement had been put on the record – the District Court dismissed the action for Smyly's failure to comply with

court orders and failure to diligently prosecute consummation of the settlement. At the hearing, the Court explained:

> I think we've been over many of these things many times before, and the Court did make an Order enforcing the settlement.
>
> The Court has tried to bend over backwards on behalf of both sides to try and avoid any communication problems between the parties following the consummation of the settlement. . . . But the Court went through and tried to make a release that was totally consistent with what it found to be a settlement.
>
> Ms. Smyly has chosen, for her reasons, not to go forward with it, and I think this case has come to an end[.]

Under these circumstances, we cannot say the District Court abused its discretion in dismissing the action under Rule 41(b). The District Court allowed Smyly several opportunities to present her views regarding the settlement. The record supports the finding that there was a binding settlement. The District Court displayed considerable patience, especially after Smyly's counsel withdrew and she proceeded pro se.[1] The Court gave her ample notice that failure to comply with court orders would result in dismissal, and gave Smyly several chances to obey its rulings. The District Court acted well

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[1] We therefore reject Smyly's argument that Judge Whyte should have recused himself. Adverse rulings are not grounds for recusal. *See Liteky v. United States*, 510 U.S. 540, 556 (1994).

within its discretion in dismissing the action. *See Johns*, 114 F.3d at 876; *Al-Torki*, 78 F.3d at 1384.[2]

AFFIRMED.

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[2] The District Court's prior summary judgment order was rendered moot by the settlement and is not appealable. *See Al-Torki*, 78 F.3d at 1386 (holding that dismissal under Rule 41(b) for failure to prosecute renders prior interlocutory appeals not appealable).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Mary C. Smyly, Plaintiff, v. IBM Corporation, and Does 1 through 20, inclusive, Defendants.	NO. C-93-20149 RMW(EAI) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS MOTION TO RECUSE (Filed Dec. 15, 1997)

The motion of defendant IBM to dismiss and the motion of plaintiff Smyly to recuse came on for hearing on December 12, 1997. The court has read the moving and responding papers and heard the argument of both IBM's counsel and Ms. Smyly. The court hereby grants defendant IBM's motion to dismiss on the grounds that plaintiff has failed to comply with the court's orders and diligently prosecute the consummation of the settlement. Plaintiff's motion to recuse (and all other motions or requests by plaintiff labeled as a request for review, objections or in any other fashion) is denied. Plaintiff's motion to recuse fails to set forth facts which present grounds for recusal.

Nothing in this order, of course, affects any rights plaintiff may believe she has to appeal the judgment of dismissal to the Court of Appeals.

Dated: 12/12/97

/s/ Ronald M. Whyte
Ronald M. Whyte
District Judge

Copy of Order mailed on DEC 15 1997 to:

Mary Smyly
1412 N. English Station Road
Louisville, Kentucky 40223

Jeffrey D. Wohl
Orrick, Herrington & Sutcliffe LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-3143

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

October 14, 1998

CA No. 98-15075 Smyly v. Int'l Business

To All Parties:

The United States Court of Appeals for the Ninth Circuit is considering submission of your case without oral argument. You have ten (10) days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. See 9th Cir. R. 34-4. Please send an original and three (3) copies of your statement to Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since the filing of a party's last brief. See Fed. R. App. P. 28(j). Send an original and three (3) legible copies to the Clerk's Office, on letter size paper, with proof of service on all parties.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Arden Wong
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____ SMYLY _____ Appellant/Petitioner	CASE NO. _____ 98-15075 _____
vs	
_ IBM CORPORATION _ Appellee/Respondent	

APPELLANT/PLAINTIFF'S STATEMENT
IN FAVOR OF ORAL ARGUMENT

Appellant/plaintiff believes the Court will be greatly and significantly aided by oral argument in assessing the issues involved in this case.

This case has had a long (almost five years) and complex history in the lower Court and the issues are neither simple nor straightforward.

Because of the number of procedural and substantive issues, appellant/plaintiff reasonably believes that oral argument should be heard to allow the most clear and complete presentation of the issues that is possible.

/s/ Mary Smyly 23 Oct 1998
Appellant/Plaintiff
(Attorney Pro Se)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 193939
SAN FRANCISCO, CALIFORNIA 94119-1939
December 10, 1998

In re: 98-15075 Mary Smyly v. IBM, Corp.

Recently you received notice that the United States Court of Appeals was considering submitting your case without oral argument. That notice reflected the tentative assignment of your case to a panel of the Court assigned to decide cases without oral argument.

Upon further consideration, the Court has decided that your case should be reassigned to an oral argument panel. Although in most instances a reassigned case will receive oral argument, the panel of judges to whom the case will be assigned has discretion to order the case submitted on the briefs without oral argument. When the time and place for argument before or submission to an argument panel has been determined by the Court, our office will notify you by mail.

Very truly yours,

CATHY A. CATTERSON
Clerk of Court

/s/ Tim Hom
Tim Hom
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY C. SMYLY Plaintiff-Appellant, v. INTERNATIONAL BUSINESS MACHINES INCORPORATED Defendant-Appellee.	No. 98-15075 D.Ct. No. C-93-20149-RMW ORDER (Filed March 31, 1999)

Pursuant to Circuit Rule 34-4, the panel has unanimously determined that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument. This case shall be submitted on the briefs and record, without oral argument, on Tuesday, April 13, 1999 in San Francisco.

FOR THE COURT

CATHY CATTERSON
CLERK OF THE COURT

BY: /s/ Estela Urrutia
Deputy Clerk